

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0391
Sales and Use Tax
For the Tax Period November, 2002-December, 2003**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Sales and Use Tax – Sales to Out-Of-State Purchasers

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1(a); 45 IAC 2.2-3-5(b); Sales Tax Information Bulletin #28 dated June 1992.

The taxpayer protests the assessment of sales tax on automobiles sold to out-of-state purchasers.

II. Tax Administration- Ten Percent Negligence Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b)(c).

The taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer operated a business selling used automobiles. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "Department," assessed additional sales tax, interest, and penalty for the tax period November, 2002 through December, 2003. The taxpayer protested the assessment and a hearing was held. The taxpayer withdrew its protests of the assessments for sales without exemption certificates and sales through its "tracker system." Issues discussed at the hearing included the taxpayer's protests of sales tax assessed on sales of automobiles sold to out-of-state purchasers and the associated negligence penalty. This Letter of Findings results.

I. Sales and Use Tax – Sales to Out-Of-State Purchasers

DISCUSSION

Notices of proposed assessments are prima facie evidence that the department's claim for unpaid taxes is valid. IC § 6-8.1-5-1(b). The taxpayer has the burden of proving that the department incorrectly imposed the assessment. Id.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. The taxpayer did not collect and remit sales taxes on many of the automobiles it sold in Indiana. In the audit, the department assessed sales tax on these sales. The taxpayer protested a portion of the assessment claiming that some of the sales were exempt because the purchasers were not Indiana residents who immediately took the vehicles to other states for registration and licensing.

The department's interpretation of the correct application of the sales tax in this fact situation is stated at 45 IAC 2.2-3-5(b) as follows:

The sale of any vehicle required to be licensed by the state for highway use in Indiana shall constitute selling at retail and shall be subject to the sales or use tax unless such purchaser is entitled to one of more of the exemptions as provided on form ST-108.

Sales Tax Information Bulletin #28, dated June 1992, addressed the issue of the dealer's responsibility to collect and remit sales tax on automobiles sold to non-Indiana residents who intended to license the car in another state as follows:

Motor vehicles purchased in Indiana to be immediately registered or licensed for use in another state are exempt from the sales tax. Indiana dealers making such sales should complete with the purchaser Indiana Form ST-137 and should maintain a copy for their records. In addition, a copy of this form should be submitted to the Indiana Department of Revenue, Compliance Division, by the dealer.

The taxpayer either failed to have the purchasers fill out Form ST-137 or retain the documentation. Without these forms, the taxpayer was unable to sustain its burden of proving that it was not responsible for collecting and remitting sales tax on the transactions at issue.

FINDING

The taxpayer's protest is denied.

II. Tax Administration- Ten Percent Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws,

rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The taxpayer failed to demonstrate that it met the standard of exercising “ordinary business care and prudence” in its business operations. Rather, the taxpayer breached its duty to apprise itself of the law, collect, and remit taxes, and maintain adequate records. This failure constituted negligence.

FINDING

The taxpayer’s protest is denied.